

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Amendment of Parts 1, 21, 73, 74 and 101 of the)	WT Docket No. 03-66
Commission's Rules to Facilitate the Provision of Fixed)	RM-10586
and Mobile Broadband Access, Educational and Other)	
Advanced Services in the 2150-2162 and 2500-2690)	
MHz Bands)	
)	
Part 1 of the Commission's Rules - Further Competitive)	WT Docket No. 03-67
Bidding Procedures)	
)	
Amendment of Parts 21 and 74 to Enable Multipoint)	MM Docket No. 97-217
Distribution Service and the Instructional Television)	
Fixed Service to Engage in Fixed Two-Way)	
Transmissions)	
)	
Amendment of Parts 21 and 74 of the Commission's Rules)	WT Docket No. 02-68
With Regard to Licensing in the Multipoint Distribution)	RM-9718
Service and in the Instructional Television Fixed Service)	
for the Gulf of Mexico)	
)	

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

W.A.T.C.H. TV Company ("W.A.T.C.H. TV"), pursuant to Section 1.429(f) of the Commission's Rules, hereby submits its reply to the Consolidated Opposition to Petitions for Reconsideration filed by the ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc. ("IMWED") with respect in the above-captioned proceedings.¹ For the reasons set forth below, W.A.T.C.H. TV again urges the Commission to revise the rules adopted by the

¹ See Consolidated Opposition of the ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc. to Petitions for Reconsideration, WT Docket No. 03-66 (filed Feb. 22, 2005) ["IMWED Opposition"].

Report and Order in this proceeding² and afford any multichannel video programming distributor (“MVPD”) the right to opt-out of the transition of the Broadband Radio Service (“BRS”) and Educational Broadband Service (“EBS”) to the new bandplan if, as of October 7, 2002 (the date the Coalition Proposal³ was filed), it was delivering video programming utilizing more than seven digitized BRS/EBS channels.⁴ Conversely, the Commission should reject IMWED’s meritless requests that the Commission force W.A.T.C.H. TV and others like it to go through the redundant and costly exercise of obtaining an individualized Commission waiver and that the Commission limit waivers to situations that “are very remote geographically, or separated from other populated areas by mountainous terrain.”⁵

² *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165 (2004)[“*Report and Order*”].

³ See “A Proposal For Revising The MDS And ITFS Regulatory Regime,” Wireless Communications Ass’n Int’l, Nat’l ITFS Ass’n and Catholic Television Network, RM-10586 at 10 (filed Oct. 7, 2002)[“Coalition Proposal”]. Subsequent to October 7, 2002, the Wireless Communications Association International (“WCA”), National ITFS Association and the Catholic Television Network submitted two supplements that addressed issues left open in the original white paper and sought to clarify points that apparently had been misunderstood by some parties within the industry. See “First Supplement To ‘A Proposal For Revising The MDS And ITFS Regulatory Regime,’” RM-10586 (filed Nov. 14, 2002); “Second Supplement To ‘A Proposal For Revising The MDS And ITFS Regulatory Regime,’” RM-10586 (filed Feb. 7, 2003). For simplicity’s sake, unless the context requires a different meaning, references to the “Coalition Proposal” in these comments should be read to reference all three filings.

⁴ See Petition of W.A.T.C.H. TV Company for Reconsideration, WT Docket No. 03-66, at 2-10 (filed Jan. 10, 2005) [“W.A.T.C.H. TV Petition”]; see also Petition of the Wireless Communications Ass’n Int’l, Inc. for Partial Reconsideration, WT Docket No. 03-66, at 26 (corrected version filed Jan. 18, 2005)[“WCA Petition”]. Specifically, the Commission should extend the opt-out to any call sign that is licensed to the MVPD or that is leased by the MVPD as part of its system.

⁵ See IMWED Opposition at 17. Under the model endorsed by W.A.T.C.H. TV, the Commission would establish a 30-day window after the effective date of its new BRS/EBS rules during which
(continued on next page)

The underlying record on this matter is undisputed:

- After nearly thirteen years and well over \$20,000,000 of its own investment, W.A.T.C.H. TV has successfully transformed its operations in and around Lima, OH from the 11-channel analog video-only service it launched in 1992 into a state-of-the-art network that utilizes the BRS/EBS spectrum to provide over 200 channels of competitive digital video and audio service to over 12,000 subscribers. In addition, W.A.T.C.H. TV offers a wireless broadband Internet access service using both an eight-sector, higher-power frequency division duplex system capable of serving over 8,000 subscribers and recently launched a lower-power, non-line-of-sight time division duplex system. The company currently provides wireless broadband service to over 4,000 subscribers, many of whom have no other source of high-speed Internet access, and that number is growing daily.⁶ *W.A.T.C.H. TV uses, and where possible, reuses, every megahertz available to it in the 2.1 and 2.5 GHz bands.*⁷
- As confirmed by the *Report and Order*, the Commission plainly is aware that W.A.T.C.H. TV's system will be at risk of extinction if it is forced to transition to the new BRS/EBS bandplan.⁸ Indeed, it has long been a matter of record that W.A.T.C.H. TV's existing digital operations would suffer a 75% *loss* of video programming if it cannot opt-out of the transition and is limited to using just the seven channels in the Middle Band Segment ("MBS") for the high-power, high-site

any qualifying 2.5 GHz band MVPD could certify to the Commission in writing that it qualified for opt-out treatment under the "seven channel" rule noted above. Upon close of the 30-day window, the Commission would publish the list of certifying MVPDs and their affiliated licensees – such publication would automatically authorize those parties to definitely exercise their opt-out rights by so notifying a proponent no later than 30 days after commencement of the Transition Planning Process. *See* W.A.T.C.H. TV Petition at 6.

⁶ Because its services are available throughout its entire authorized service area, W.A.T.C.H. TV's system is able to serve customers who cannot obtain access to competing services offered by incumbent cable multiple system operators and local exchange carriers. Moreover, even where such competing services are available, W.A.T.C.H. TV's presence in the market imposes downward pressure on how those competing services are priced, as W.A.T.C.H. TV offers consumers a highly attractive alternative.

⁷ The sole exception is the 125 kHz wide I channels, which have historically been underutilized throughout the industry.

⁸ *See Report and Order*, 19 FCC Rcd at 14199 ¶ 77 ("[W]e are sympathetic to the predicament of those MVPD licensees that developed successful businesses under the old rules, and to their customers that receive both video and broadband services from those MVPD licensees. We are also sympathetic to those BRS licensees that have a viable business for high-powered operations, but who need more [than] seven digitized MBS channels to deliver service to their customers, which would constitute all of the high-power spectrum in the 2.5 GHz band.").

transmission of video programming. In other words, W.A.T.C.H. TV *cannot* transition to the new BRS/EBS bandplan, since there are not enough channels in the MBS to accommodate W.A.T.C.H. TV's digital video operations.⁹

- Save for IMWED, *every party in this proceeding who commented on the issue has supported the provision of an opt-out to W.A.T.C.H. TV and any other BRS/EBS MVPD that was providing service on more than seven digitized channels.*¹⁰

Ironically, IMWED does not contest any of these facts or the Commission's recognition that W.A.T.C.H. TV will be in substantial peril if forced to transition to the new BRS/EBS bandplan. Instead, IMWED argues that the Commission should subject W.A.T.C.H. TV and others that are similarly situated to a waiver process because MVPD operations may cause interference to transitioned BRS/EBS operations in neighboring markets.¹¹ Indeed, IMWED goes so far as to suggest that all BRS/EBS MVPDs be required to transition to the new BRS/EBS

⁹ For further discussion of W.A.T.C.H. TV's operations, *see Report and Order*, 19 FCC Rcd at 14199 n. 190 ¶ 76; Letter from Thomas Knippen, Vice President and General Manager, W.A.T.C.H. TV Company, to Michael K. Powell, Chairman, Federal Communications Commission, WT Docket No. 03-66 (filed June 2, 2004); Comments of W.A.T.C.H. TV Company, WT Docket No. 03-66 (filed Sept. 8, 2003); Letter from Thomas Knippen, Vice President and General Manager, W.A.T.C.H. TV Company, to John B. Muleta, Chief, Wireless Telecommunications Bureau, WT Docket No. 03-66 (filed, July 29, 2003); Letter from Thomas Knippen, Vice President and General Manager, W.A.T.C.H. TV Company, to Marlene H. Dortch, Secretary, Federal Communications Commission, RM-10586 (filed Nov. 14, 2002).

¹⁰ *See, e.g.*, Consolidated Reply of Wireless Direct Broadcast System to Petition for Reconsideration, WT Docket No. 03-66, at 3 (filed Mar. 4, 2005); Consolidated Reply of C&W Enterprises, Inc. to Petition for Reconsideration, WT Docket No. 03-66, at 4 (filed Mar. 4, 2005); WCA Petition at 26-30; Consolidated Opposition of Sprint Corporation to Petitions for Reconsideration, WT Docket No. 03-66, at 9-10 (filed Feb. 22, 2005); Consolidated Opposition of Nextel Communications, Inc. to Petitions for Reconsideration, WT Docket No. 03-66, at 20-21 (filed Feb. 22, 2005); Comments of the National Telecommunications Cooperative Ass'n in Support of Petitions for Reconsideration, WT Docket No. 03-66, at 2-4 (filed Feb. 22, 2005); Consolidated Opposition to and Comments of the BRS Rural Advocacy Group in Support of Petitions for Reconsideration, WT Docket No. 03-66, at 7-9 (filed Feb. 22, 2005); Petition of Blooston, Mordkofsky, Dickens, Duffy and Predergrast for Reconsideration and Clarification, WT Docket No. 03-66, at 9-10 (filed Jan. 10, 2005); Petition of Central Texas Communications, Inc. for Reconsideration, WT Docket No. 03-66, at 7-9 (filed Jan. 10, 2005).

bandplan “unless they are very remote geographically, or separated from other populated areas by mountainous terrain.”¹²

IMWED’s argument completely misses the point. W.A.T.C.H. TV’s proposed opt-out is grounded in equitable considerations that encompass only the very small number of MVPDs utilizing more than seven digitized channels. By definition, these MVPDs cannot be accommodated in the new MBS since the MBS contains only seven channels. No one in this proceeding disagrees that high-power, MVPD operations could cause interference to neighboring cellularized BRS/EBS facilities (although there is also no dispute that this interference can be mitigated substantially if the cellular system is appropriately designed). The real issue, which IMWED avoids, is whether the equities of affording an automatic opt-out to the very narrow class of MVPDs in W.A.T.C.H. TV’s situation outweigh the costs a neighboring cellular system will incur to mitigate harmful interference. As confirmed by the lack of any opposition to W.A.T.C.H. TV’s filings on this issue save for IMWED, the equities in such cases clearly fall on the side of adopting the opt-out rule W.A.T.C.H. TV has requested.

As demonstrated in W.A.T.C.H. TV’s Petition for Reconsideration, additional considerations further tilt the balance of equities in favor of the opt-out model proposed by W.A.T.C.H. TV. Unlike the automatic opt-out approach advocated by W.A.T.C.H. TV and WCA, the case-by-case waivers suggested by IMWED will subject W.A.T.C.H. TV and its brethren to unnecessary uncertainty as to whether it will be permitted to opt-out of the transition

¹¹ See IMWED Opposition at 17.

¹² *Id.*

process.¹³ Given the multimillion dollar investment W.A.T.C.H. TV has made and continues to make towards developing its system and delivering service to subscribers, the Commission should be making every effort to *minimize* W.A.T.C.H. TV's uncertainty as to its ability to continue its existing operations independent of the transition process.¹⁴ Moreover, adoption of W.A.T.C.H. TV's suggested approach will expedite transitions, since transition proponents will know with certainty whether they are required to design around an MVPD that is entitled to opt-out, and, conversely, will not have to endure the uncertainty and delays associated with IMWED's proposal for case-by-case waivers.¹⁵ Lastly, the potential risk of interference inherent in W.A.T.C.H. TV's opt-out approach is mitigated by the fact that those MVPDs who opt-out and their affiliated licensees would be required to participate in the transition planning process and to make a variety of technical modifications when appropriate to mitigate any adverse impact on neighboring systems.¹⁶

¹³ See W.A.T.C.H. TV Petition at 7.

¹⁴ *Id.* (emphasis in original).

¹⁵ *Id.* at 10. The Commission's decision thus is inconsistent with its general preference for streamlined regulatory processes over case-by-case adjudications where the latter merely impose additional delay with no countervailing benefit. See, e.g., *Review of Part 87 of the Commission's Rules Concerning the Aviation Radio Service*, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 21432, 21449 (2003); *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket No. 98-77 and 98-166, 16 FCC Rcd 19613, 19698 (2001); *Streamlining the Commission's Rules and Regulations for Satellite Application and Licensing Procedures*, Report and Order, 11 FCC Rcd 21581, 21584 (1996).

¹⁶ *Id.* at 9-10; see also WCA Petition at 30-31.

IMWED's Opposition does not even attempt to address, much less refute, any of this. Rather, IMWED is content to spread uninformed fears over interference in the hope that the Commission will not notice the lack of substance. The Commission must take account of the entire record before it, which overwhelmingly establishes that for digital MVPDs like W.A.T.C.H. TV, relief should be granted even to non-remote MVPD operations. Case-by-case waivers will be redundant exercises whose additional paperwork, administrative costs, time delays, and associated regulatory uncertainty substantially outweigh any speculative benefit. W.A.T.C.H. TV's automatic MVPD opt-out is the superior alternative.

WHEREFORE, for the reasons set forth above, W.A.T.C.H. TV Company requests that the Commission grant its Petition for Reconsideration and afford BRS/EBS MVPDs the right to opt-out of the transition to the new bandplan if they were delivering video programming on more than seven digitized BRS/EBS channels as of October 7, 2002, without having to obtain a waiver from the Commission to do so.

Respectfully submitted,

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March 9, 2005

CERTIFICATE OF SERVICE

I, Karla E. Huffstickler, hereby certify that the foregoing Reply to Opposition to Petition for Reconsideration was served this 9th day of March, 2005 by depositing true copies thereof with the United States Postal Service, first class postage prepaid, addressed to the following:

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